STATE OF MICHIGAN

COURT OF APPEALS

PAULINE PHILLIPS,

Plaintiff-Appellee,

v

KHALIL RAHAL and WASHINGTON MUTUAL HOME LOAN INC,

Defendants-Appellants,

and

CARMELITA MCCOY, SHORE FINANCIAL SERVICES INC d/b/a/ SHORE MORTGAGE, WASHINGTON MUTUAL BANK, BANK UNITED, AMERICAN INSURANCE CO, EDWARD JONES, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS INC and, CHARLES MCCOY,

Defendants.

UNPUBLISHED
September 30, 2003

No. 239624
Wayne Circuit Court
LC No. 99-936579-CH

Before: Whitbeck, C.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendants Khalil Rahal and Washington Mutual Home Loan, Inc., appeal by right an order quieting title to the property at 6846 Montrose in Detroit in plaintiff Pauline Phillips, personal representative of the estate of Thelma McCoy, her aunt. The trial court, following a bench trial, found that McCoy's signature on a deed purporting to convey the house from McCoy to her late husband's granddaughter, Carmelita McCoy, was not authentic, and that the subsequent conveyance from Carmelita McCoy to Rahal was therefore invalid. Because we conclude that the trial court's finding was not clearly erroneous, no evidentiary errors occurred, and the preclusion doctrines are inapplicable, we affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E)(1)(b).

I. Basic Facts And Procedural History

This case involves a disputed deed to the property at 6846 Montrose in Detroit. Thelma McCoy lived there from 1995 until she died in February 1999 at the age of eighty-seven. After

McCoy's death, Phillips and her sister, Thelma Woolfolk, who were both raised by McCoy, went to McCoy's house and found it occupied by descendants of Thelma McCoy's late husband, who forbade the sisters to remove anything from the house. Woolfolk explained that McCoy's husband's family, who were Thelma McCoy's stepfamily, had a reputation for being violent and involved with drugs and guns, and so the two left to avoid a confrontation.

On August 2, 1999, Phillips filed a complaint to terminate the tenancy of the "occupants" of the house, alleging that they had no legal claim to the property. The district court issued a default judgment evicting the occupants. However, at a motion hearing to set aside the default judgment, Thelma McCoy's step-granddaughter Carmelita McCoy produced a recorded deed stating that she had bought the property from Thelma McCoy for $52,000. The deed, which was drafted by Charles McCoy, was executed before a notary public on December 28, 1997, and contained four signatures, identified as those of Thelma McCoy, Carmelita McCoy, and two unidentified witnesses named William McPhereson and Phillip Morton. The deed was not recorded until March 22, 1999. On the basis of this deed, the district court set aside the default judgment and dismissed the complaint without prejudice.

Phillips was not present in the courtroom when the deed was produced and the suit was dismissed. However, when she later saw the deed, she noticed that McCoy's signature did not appear authentic. Phillips filed a complaint in circuit court alleging forgery, slander of title, conversion, and breach of contract for failing to pay McCoy the $52,000 identified in the deed. Phillips amended the complaint to request an injunction to prevent Carmelita McCoy from selling the property; however, after discovering that Carmelita McCoy had sold the property to Khalil Rahal, Phillips again amended the complaint to add Rahal and the various institutions to which his mortgage had been assigned, including Washington Mutual.

At trial, Robert Kullman, a forensic document analyst for Speckin Laboratories, compared McCoy's purported signature on the deed to photocopies of McCoy's signature taken from several documents executed shortly before and shortly after the deed was signed, including personal checks, credit cards, a tax form, and her driver's license. Kullman concluded that the signature on the deed was "not the true signature of the same Thelma McCoy represented in" those writings known to contain her signature.

Phillips, who was raised by McCoy until she turned eighteen and visited McCoy on a weekly basis until her death, testified that she was familiar with McCoy's signature, and that the signature on the deed did not resemble it. Phillips noted that McCoy was in good health until her death and was able to drive and do household chores without assistance. Woolfolk, who also maintained a relationship with McCoy until her death, said that McCoy was able to pursue hobbies such as crocheting and knitting without exhibiting any shaking, palsy, or other difficulty in using her hands. Woolfolk also testified that the signature on the deed was not McCoy's, because "[s]he never signed that sloppy." Defendants attempted to introduce a definition of a medical condition called a "transient ischemic attack" from a medical book to support the theory that McCoy, whose death certificate stated that she suffered from ischemic heart disease, may have signed the deed while suffering such an attack. However, the trial court excluded the evidence on the basis that the theory was speculative.

Edward Jones, the eighty-four-year-old notary public whose stamp appeared on the deed, left the courtroom before he could testify. According to his deposition, which was admitted into

evidence, he performed notary services from his dry-cleaning business for two dollars a document. Jones testified that he always required identification before notarizing a document, and that his stamp had never been misplaced or stolen. He did not keep records of his notary transactions and did not recall notarizing the deed in question. He stated that he never remembered four people coming in at once to sign a document, and that the usual practice was for only one person at a time to request his notary services.

Carmelita McCoy and Charles McCoy were served with the summons and complaint, but were defaulted and did not appear in court to testify. McPhereson and Morton, who witnessed the deed, could not be located. After hearing the evidence, the trial court concluded that Phillips had presented sufficient credible evidence to establish that the signature on the deed was not McCoy's, and that, because title had not passed from Thelma McCoy to Carmelita McCoy, the attempted transfer from Carmelita McCoy to Rahal was not valid. Accordingly, the trial court quieted title in Phillips, and this appeal followed.

II. Forgery

A. Standard Of Review

Actions to quiet title are equitable in nature and therefore are reviewed de novo; however, we will not reverse a trial court's findings of fact in a bench trial unless they are clearly erroneous.[1] A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made.[2] In reviewing the trial court's findings, we give regard to the trial court's special opportunity to judge the credibility of the witnesses who appeared before it.[3]

B. Presumption Of Validity And Evidence In Opposition

There is a statutory presumption that the facts contained in a document to which a notary public's seal was affixed are true.[4] This presumption is rebuttable by presenting "clear, positive and credible evidence in opposition."[5] In this case, after hearing testimony from McCoy's nieces and from an expert that the signature on the deed was not McCoy's, the trial court found that Phillips had presented sufficient evidence to rebut the presumption that the signature was authentic. We conclude that this finding was not clearly erroneous.

Phillips presented many examples of McCoy's handwriting from documents that were executed shortly before and shortly after the deed was, including personal checks, credit cards, a

---

[1] *Killips v Mannisto*, 244 Mich App 256, 258; 624 NW2d 224 (2001).

[2] *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

[3] MCR 2.613(C); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

[4] MCL 55.113; *Settles v Detroit City Clerk*, 169 Mich App 797, 806; 427 NW2d 188 (1988).

[5] *Vriesman v Ross*, 9 Mich App 102, 106; 155 NW2d 857 (1967), citing *Garrigan v LaSalle Coca-Cola Bottling Co*, 362 Mich 262; 106 NW2d 807 (1961).

tax form, and her driver's license, and both the nieces, as lay witnesses familiar with McCoy's signature, and the expert, concluded that the signature on the deed was not McCoy's. Indeed, the expert testified that in comparing the signature on the deed to the signatures on McCoy's personal documents, he "found nothing in the questioned signature that resemble[d] the known signatures" of McCoy.

We further note that no other evidence was introduced to indicate that the property sale actually took place as represented. For example, although the deed indicated that McCoy was paid $52,000 for the property, no evidence was presented that McCoy had ever received this amount, or any comparably large sum.

Finally, the notary public recalled that, although there were four signatures on the deed, four people had never come in for notary services at the same time, and generally only one person at a time came in and signed in his presence. This testimony indicates that, while the notary might have required identification from one of the signers, it is unlikely that he required identification from all four. In *Vriesman v Ross*,[6] a document purporting to transfer title to a vehicle contained a notary public's signature; however, the notary public testified that the transferor had not signed the document in his presence as required by statute. This testimony was deemed to be "sufficiently clear and positive to rebut the presumption afforded by [MCL 55.113]" that the transfer was valid.[7]

Here, taking the notary's testimony together with the expert and lay opinions that the contested signature was not McCoy's, and considering the absence of any evidence that McCoy had received payment for the property, we conclude that the trial court did not clearly err in finding that Phillips had presented clear, positive, and credible evidence that McCoy's signature had been forged and the deed was invalid.

III. Failure To Admit Evidence

A. Standard Of Review

We review the trial court's decision to admit or exclude evidence for an abuse of discretion.[8]

B. Admissibility Of Medical Texts

Defendants sought to introduce a definition of a medical condition called a "transient ischemic attack" from The American College of Physicians Complete Home Medical Guide to support the theory that McCoy may have signed the deed while suffering such an attack, which would provide an alternative explanation to forgery for the discrepancy in her signatures. While

---

[6] *Vriesman*, *supra*.

[7] *Id*. at 106-107.

[8] *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

acknowledging that this text was hearsay, defendants maintained that is was admissible under MRE 803(17), which allows the admission of "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." The trial court refused to admit the definition on the ground that there was no evidence that McCoy had ever suffered a transient ischemic attack. The Court further noted that because the argument was speculative, there was no foundation to admit the evidence.

We agree with Phillips' argument on appeal that the trial court did not abuse its discretion in excluding the evidence on this basis. More importantly, however, we are not convinced that a medical reference book is properly included under the MRE 803(17) exception. Under the principle of ejusdem generis, "'when a text lists a series of items, a general term included in the list should be understood to be limited to items of the same sort.'"[9] In our view, market quotations, tabulations, lists, and directories comprise a category of publications that do not provide substantive or in-depth information about a topic, but only compilations of factual data that are not subject to debate or differences of opinion. By contrast, the portion of the medical guide in question contains substantive medical information, and is not a mere list or compilation of diseases. We believe that the medical guide is more properly considered a learned medical treatise. Under MRE 707, learned treatises are not admissible as substantive evidence.[10] Therefore, the trial court properly excluded the evidence.

IV. Res Judicata And Collateral Estoppel

A. Standard Of Review

Whether the doctrines of res judicata and collateral estoppel apply is a question of law that we review de novo.[11]

B. Requirements Of Actual Litigation And Decision On The Merits

Generally, collateral estoppel precludes relitigation of an issue if (1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full opportunity to litigate the issue, and (3) there is mutuality of estoppel.[12] In this case, the question of fact at issue—that is, whether McCoy's signature was forged—was never actually litigated. Instead, the complaint was dismissed without prejudice

---

[9] See *Weakland v Toledo Eng'g Co*, 467 Mich 344, 350 n 1; 656 NW2d 175 (2003), quoting Antonin Scalia, *A Matter of Interpretation* (Princeton, New Jersey: Princeton University Press, 1997), p 26.

[10] See MRE 707; *Hilgendorf v St John Hospital & Medical Center Corp*, 245 Mich App 670, 702; 630 NW2d 356 (2001).

[11] *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999) (res judicata); *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996) (collateral estoppel).

[12] *Nummer v Dep't of Treasury*, 448 Mich 534, 541-542; 533 NW2d 250 (1995).

after Carmelita McCoy produced the recorded deed. Phillips was not in court at the time, and there was no reason for her attorney, who presumably was unfamiliar with McCoy's signature, to suspect that it was not authentic. Because the forgery issue was not actually litigated, and because Phillips had no opportunity to litigate the issue, collateral estoppel is inapplicable.

Similarly, res judicata only applies if "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies."[13] Here, the case was dismissed without prejudice after Carmelita McCoy produced the recorded deed. Because a dismissal without prejudice is not an adjudication on the merits,[14] res judicata is also inapplicable.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper

[13] *Sewell v Clean Cut Mgt*, 463 Mich 569, 575; 621 NW2d 222 (2001).

[14] *Yeo v State Farm Fire & Cas Ins Co*, 242 Mich App 483, 484; 618 NW2d 916 (2000).